IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

JOHN D. WILCOX, Appellant,
vs.
THE EASTERN OREGON LAND COMPANY, Appellee.
No. 454.

E. I. MESSINGER, Appellant,
vs.
THE EASTERN OREGON LAND COMPANY, Appellee.
No. 455.

Brief and Argument on Behalf of Appellee, submitted by Counsel under Rule 20, Supreme Court Rules.

These suits were brought to obtain decrees cancelling United States patents issued to the defendants, purporting to convey to them certain lands described in the complaint. The lands in controversy are within the limits of the grant of lands in place made to the State of Oregon by the act of Congress approved February 25,

1867, to aid in the construction of a military wagon road. They are claimed by the defendant to be within the overlapping limits of the grant to the Northern Pacific Railroad Company.

The cases were heard in the court below on bill and answer. The bills and answers are alike in both cases, except as to the names of the defendants, the description of the lands claimed by them, and the law of the United States under which they claim to have acquired title to the same. In the case of the company against Messinger, the land in controversy is situated within twenty miles of the line of the Northern Pacific Railroad Company's road, as designated on the map of the general route of said road, filed by said company August 13, 1870; and in the case of the company against Wilcox, the land is situated more than twenty miles, and less than forty miles, from said line.

Precisely the same questions are involved in both suits, except that if the court should be of the opinion that any lands were excepted from the said grant to the State of Oregon by reason of being within the grant of the Northern Pacific Railroad Company the court will be called upon to decide, in the case of the company against Wilcox, the question whether the Northern Pacific Railroad Company took by its grant twenty sections to the mile or ten sections to the mile only, in the State of Oregon, between Wallula and Portland.

STATEMENT OF FACTS.

The facts alleged in each bill, and admitted by the answer in each suit, may be summarized as follows:

The Bill.

That the complainant is a corporation under the laws of the State of California, and a citizen of that State, and that the defendant is a citizen of the State of Oregon.

That on the 25th day of February, 1867, the Congress of the United States passed, and the President of the United States duly approved, an act granting to the State of Oregon, to aid in the construction of a wagon road from Dalles City, on the Columbia River, to a point on Snake River opposite Fort Boise, in Idaho Territory, the alternate sections of public land, designated by odd sections, to the extent of three miles in width on each side of said road, to be exclusively applied to the construction of said road, excepting and reserving from said grant and the operation of said act only lands theretofore reserved or appropriated.

That said act provided that the lands thereby granted should be disposed of by the Legislative Assembly of the State of Oregon for the purpose aforesaid, and no other; that said road should be and remain a public highway for the use of the Government of the United States, free from tolls or other charges for the transportation of any troops, property, or mails of the United States; and that the lands thereby granted should be disposed of only in the following manner, that is to say: When the Gov-

ernor of the State should certify to the Secretary of the Interior that ten coterminous miles of said road were completed, then a quantity of the land granted by the act, not exceeding thirty sections, might be sold, and so on, from time to time, until said road should be completed.

That by the act of the Legislative Assembly of the State of Oregon approved October 20, 1868, entitled "An act dedicating certain lands to the Dalles Military Road Company," the State of Oregon granted to the said Dalles Military Road Company, a corporation duly incorporated for the purpose of constructing said road, all lands, rights of way, rights, privileges, and immunities granted or pledged to the State of Oregon by the said act of Congress, for the purpose of aiding said Dalles Military Road Company in constructing the road, as mentioned and described in said act of Congress, and upon the conditions and immunities therein prescribed.

That prior to the 23d day of June, 1869, the said Dalles Military Road Company surveyed and definitely located the line of its said wagon road between the points and upon the route designated in said act of Congress, and in the said act of the Legislative Assembly of the State of Oregon, and had fully constructed and completed its said road, and had filed in the executive office of the Governor of the State of Oregon a plat or map of the said Dalles Military Road Company, upon which was traced and shown the definite location of said road, as constructed from its terminus at Dalles City, Oregon, to its terminus on Snake River, and the limits of the grant of lands in place made to the State of Oregon by

the said act of Congress, to aid in the construction of said road, and also the indemnity limits of the said grant.

That on June 23, 1869, the Governor of Oregon certified that the plat or map of said Dalles Military Road had been duly filed in the executive office, and that it showed the location of the line of route upon which said road was constructed, in accordance with the requirements of the act of Congress aforesaid, approved February 25, 1867, and with the said act of the Legislative Assembly of the State of Oregon, approved October 20, 1868; and the said Governor of Oregon at that date further certified that he had made a careful examination of said road since its completion, and that the same was built in all respects as required by the conditions of said act, and was then accepted, said certificate being set forth at length in the bill of complaint.

That upon the filing of said plat or map in the executive office of the Governor of the State of Oregon, showing the definite location of its said road, in connection with the public surveys, and upon the execution of the said certificate by the Governor of Oregon, certifying to the completion of said road, the grant made by the said act of Congress of February 25, 1867, to the State of Oregon, to aid in the construction of said road, became located and definitely fixed and attached to the odd sections of land as shown by the public surveys within the limits of three miles on each side of said road, as located and constructed.

That the said Dalles Military Road Company duly filed in the office of the Secretary of the Interior of the

United States a map or plat of said Dalles Military Road, showing the definite location thereof with reference to the public surveys so far as then made, and the said certificate of the said Governor of the State of Oregon, certifying to the construction of said road, that said map was duly executed in accordance with the requirements and regulations of the Interior Department of the United States, and was accepted and received and filed in said Department; and that on December 18, 1869, the then Commissioner of the General Land Office, by order of the Secretary of the Interior, withdrew from sale the odd-numbered sections three miles upon each side of said wagon road, as delineated and shown on said map, in favor of the Dalles Military Road Company.

That the Congress of the United States, by an act approved June 18, 1874, entitled "An act to authorize the issuance of patents for lands granted to the State of Oregon in certain cases," provided that in all cases where lands have been granted by Congress to the State of Oregon, to aid in the construction of wagon roads, and the certificate of the Governor of Oregon should show that any said road had been constructed or completed as in said acts required, patents should be issued in due form to the State of Oregon for such lands unless the State should by public act have transferred its interest in said lands to any corporation, in which case the said lands were to be patented to such corporation.

That Edward Martin, a citizen of the State of California, placing confidence in the said certificate of the Governor of the State of Oregon, and in said acts of Congress, and the withdrawal of said lands by the Commissioner of the General Land Office, on the 31st day of May, 1876,

purchased in good faith, for the sum of $125,000, then paid by him to the Dalles Military Road Company, all the lands embraced in said grant, except the portions which had been previously sold, and at the time of said purchase and at the time of paying said consideration had no notice or knowledge, actual or constructive, of any claim of the Northern Pacific Railroad Company, or any claim made by any corporation or person, or by the Government of the United States, that any portion of the lands granted to the State of Oregon, as aforesaid, were excepted, or claimed to be excepted, from said grant on account of any previous grant to the Northern Pacific Railroad Company, or otherwise.

That on the 31st day of January, 1877, said Edward Martin conveyed an undivided one-fourth interest in said lands to D. V. B. Henarie, he, the said Henarie, having paid one-fourth of the consideration of said conveyance from the Dalles Military Road Company to Edward Martin, and having made the purchase and paid the consideration in good faith, and relying upon the said acts of Congress, and certificate of the Governor of the State of Oregon, and the withdrawals of said lands, and that he had no notice or knowledge, actual or constructive, that any portion of the said grant was claimed to be excepted for the reasons aforesaid.

That on the 12th day of May, 1880, said Edward Martin died intestate in the city of San Francisco, leaving certain heirs, who are named in the bill.

That among said heirs were James V. Martin, Genevieve E. Martin, Peter D. Martin, Walter S. Martin, and Andrew D. Martin, who were then minors.

That afterwards the interests of the minors in said

grant were sold by order of the Probate Court of Wasco County, Oregon, and were purchased at guardian's sale by Peter Donahue and James Phelan, who paid a valuable consideration therefor, and who purchased the same and paid said consideration with no knowledge or notice, actual or constructive, that any portion of the lands within the limits of said grant was claimed by the Northern Pacific Railroad Company, or any other corporation or person, or by the Government of the United States, adversely to the said Dalles Military Road Company.

That afterwards the heirs of said Edward Martin and the said Peter Donahue and James Phelan conveyed the said grant to the Eastern Oregon Land Company, the complainant in the present suits.

That the said Dalles Military Road Company duly selected, among other lands which had been earned by it by the construction of its said wagon road, the lands in controversy, and that the same were a part of the grant of lands in place to the State of Oregon by the said act of February 25, 1867, and were a portion of the lands withdrawn in favor of the said Dalles Military Road Company on the 18th day of December, 1869, and were situated on the south side of the line of the general route of the Northern Pacific Railroad Company, as designated on the said map filed August 13, 1870, and were then unoccupied lands, there being no claim to the same adverse to the company, and that the list containing said selection was duly certified by the Register and Receiver of the Land Office at Dalles City to the Commissioner of the General Land Office.

That by an act approved July 2, 1864, Congress granted

to the Northern Pacific Railroad Company, to aid in the construction of a railroad from Lake Superior to Puget Sound, with a branch, via the Columbia River, to Portland, by the most eligible route, every alternate odd section of public land, not mineral, to the amount of twenty alternate sections to the mile on each side of said road through the Territories of the United States, and ten alternate sections a mile on each side of said road whenever it passed through a State, and whenever on the line thereof the United States had full title not reserved, sold, *granted*, or otherwise appropriated, and free from preemption or other claims or rights at the time the line of said road should be *definitely fixed* and the plat thereof filed in the office of the Commissioner of the General Land Office.

That by a Joint Resolution of Congress of May, 31, 1870, the Congress of the United States authorized the said Northern Pacific Railroad Company to locate and construct, under the provisions and with the privileges, grants, and duties provided for in its act of incorporation, its main road to some point on Puget Sound, via the valley of the Columbia River, with the right to locate and construct its branch from some convenient point on its main line across the Cascade Mountains to Puget Sound.

That on the 13th day of August, 1870, the officers of the Northern Pacific Railroad Company filed a map or plat of the *general route* of its road, and filed the same in the office of the Commissioner of the General Land Office, and presented the same to the then Secretary of the Interior, showing, among other things, the general route

of said road, following the Columbia River from Wallula, in the then territory of Washington, to a point on the north side of said river opposite Portland, in the State of Oregon.

That the Secretary of the Interior accepted said map and directed the Commissioner of the General Land Office to withdraw, on account of the grant to the said Northern Pacific Railroad Company, from sale, pre-emption, homestead, or other disposal, the odd-numbered sections not sold or reserved, or to which prior rights had not attached, within twenty miles on each side of the route of the said Northern Pacific Railroad.

That the line of the road of said Northern Pacific Railroad Company, between Wallula and Portland, to a point opposite Portland, was never surveyed; that the line of said road between said points was never *definitely located* or fixed by the said company; that no map of definite location of said road was ever filed in the office of the Commissioner of the General Land Office at Washington City or in the Interior Department; that the said Northern Pacific Railroad Company never constructed any portion of its said road between the said town of Wallula and the said city of Portland.

That upon the filing the said map of the general route of its road by the said Northern Pacific Railroad Company, on the 13th day of August, 1870, the Secretary of the Interior directed the withdrawal of the odd-numbered sections lying within the supposed limits of the grant of lands in place to the Northern Pacific Railroad Company, as aforesaid.

That Congress, by an act forfeiting lands theretofore

granted for the purpose of aiding in the construction of railroads and other purposes, approved September 29, 1890, resumed title to and restored to the public domain, so far as Congress had power so to do, all lands theretofore granted to aid in the construction of railroads opposite to and coterminous with the portion of such railroads not then completed and in operation, for the construction or benefit of which said lands were granted.

That after the passage of said act, the Secretary of the Interior of the United States wrongfully assumed and claimed that the odd sections of the public land on the south side of and within forty miles of the line of the general route of the said Northern Pacific Railroad, between Wallula and a point on the north side of the Columbia River, opposite the city of Portland, in the State of Oregon, as said line was designated on said map of general route of the road of said company, filed August 13, 1870, had been granted to the Northern Pacific Railroad Company, and were reserved and excepted from the said grant made to the State of Oregon by the said act of February 25, 1867, and had reverted to and became public lands of the United States, open to settlement and sale under the land laws of the United States, and that the said Secretary caused the said lands to be open to settlement and sale, and thereupon the defendant settled upon the said tract of land, and afterwards made application to purchase the same, and that afterwards the President of the United States issued a patent to him for said lands, a copy of which patent is attached to the bill.

That the Secretary of the Interior of the United States

had no jurisdiction or authority to open the said lands to settlement and permit the defendant to settle thereon, and the President of the United States had no jurisdiction or authority to issue a patent therefor.

That at and before the time the defendant settled upon said tract of land, or made claim thereto, or made application to purchase the same, the defendant well knew that the said lands were within the limits of the grant in place to the said Dalles Military Road Company, and that the same were claimed by the said Dalles Military Road Company, and its successors and assigns, under said grant.

That if it had been true that the lands in question were excepted from said grant to the State of Oregon, as claimed by the defendant, under the provisions of section 5 of the act of Congress entitled "An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads, and for the forfeiture of unearned lands, and for other purposes," approved March 3, 1887, the complainant would have been entitled to purchase said lands from the United States, being a *bona-fide* purchaser thereof, without notice of any claim of the said Northern Pacific Railroad Company to the said lands, but that complainant received no notice and had no notice or knowledge of the application of the defendant to purchase said land, and had no opportunity to apply to purchase the same under the provisions of said section 5, or otherwise.

That a patent having been issued for said land, the Interior Department has no longer jurisdiction of the same, and can not give complainant the most convenient

and conclusive evidence of its title to the said lands, and can not issue to complainant patent for the same, as required by the said act of June 18, 1874, until the patent to the defendant has been cancelled, annulled, and set aside, and that said patent is a cloud upon the title of complainant to said land described therein, and complainant is remediless in a court of law.

The Answer.

By the answer, as we have said, all the material allegations of the bill are, as we conceive, admitted.

The defendant, answering the allegations of the bill that Edward Martin, the purchaser of the grant from the Dalles Military Road Company, and his grantees and the complainant, were *bona fide* purchasers, and had no actual or constructive notice or knowledge that any portion of the lands embraced within the grant to the State of Oregon, to aid in the construction of said wagon road, were excepted therefrom on account of any previous grant to the Northern Pacific; denies that the parties had no *constructive notice*, but alleges *in relation thereto* that at the time they made said purchase and received their deeds "they were all chargeable with constructive notice of the several acts of Congress in relation to said lands, and the effect thereof, and that under said acts of Congress and the acts and doings of the said railroad company, no title could pass to the said Dalles Military Road Company for the lands in question."

Denies that the grant of lands made to the Northern Pacific Railroad Company, between Wallula and Port-

land, to aid in the construction of a road between said points, never was located or fixed, and that the said railroad company never acquired any right or title or interest to the same.

Denies that the Commissioner of the General Land Office and the Secretary of the Interior wrongfully claim that said lands were excepted from said grant to the State of Oregon on account of being included in the grant to the Northern Pacific Railroad Company.

By the answer, also, the defendant alleges that on March 16, 1865, the then Secretary of the Interior received from Josiah Perham, the then President of the Northern Pacific Railroad Company, a certain letter of that date, a copy of which is attached to the answer, and that accompanying said letter was a map referred to therein, a copy of which is made part of the answer, and that on the 9th of March, 1865, the Secretary of the Interior transmitted said map to the then Commissioner of the General Land Office, with a letter, a copy of which is attached to the answer, and that on June 22, 1865, the then Commissioner of the General Land Office returned said map to the Secretary of the Interior, with a letter, a copy of which is attached to the answer.

These letters show that the map was not received by the Secretary of the Interior or filed, that it was not in accordance with the requirements of the laws of the United States and the regulations of the Department, and was rejected.

This map is known as the Perham map, and has been frequently the subject of consideration by the Federal courts, as we will hereafter show.

Basis of Complainant's Claim.

The complainant (appellee) bases his right to recover in this suit upon the following act of Congress approved February 25, 1867:

Chapter LXXVII.

"An act granting lands to the State of Oregon to aid in the construction of a military wagon road from Dalles City, on the Columbia River, to Fort Boise, on the Snake River.

" *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That there be, and hereby is, granted to the State of Oregon, to aid in the construction of a military wagon road from Dalles City, on the Columbia River, by way of Camp Watson, Cañon City, and Mormon or Humboldt Basin, to a point on Snake River opposite Fort Boise, in Idaho Territory, alternate sections of public lands, designated by odd numbers, to the extent of three sections in width on each side of said road: *Provided*, That the lands hereby granted shall be exclusively applied to the construction of said road, and to no other purpose, and shall be disposed of only as the work progresses: *And provided, further*, That any and all lands heretofore reserved to the United States, or otherwise appropriated by act of Congress, or other competent authority, be, and the same are hereby, reserved from the operation of this act, except so far as it may be necessary to locate the route of said road through the same, in which case the right of way to the width of one hundred feet is granted: *And provided, further*, That the grant hereby made shall not embrace any mineral lands of the United States.

"SEC. 2. *And be it further enacted*, That the lands hereby granted to said State shall be disposed of by the

legislature thereof for the purpose aforesaid, and for no other; and the said road shall be and remain a public highway for the use of the Government of the United States, free from tolls or other charges upon the transportation of any property, troops, or mails of the United States.

"SEC. 3. *And be it further enacted*, That said road shall be constructed with such width, gradation, and bridges as to permit of its regular use as a wagon road, and in such other special manner as the State of Oregon may prescribe.

"SEC. 4. *And be it further enacted*, That the State of Oregon is authorized to locate and use in the construction of said road an additional amount of public lands not previously reserved to the United States nor otherwise disposed of, and not exceeding ten miles in distance from it, equal to the amount reserved from the operation of this act in the first section of the same, to be selected in alternate odd sections as provided in section first of this act.

"SEC. 5. *And be it further enacted*, That lands hereby granted to said State shall be disposed of only in the following manner, that is to say, when the governor of said State shall certify to the Secretary of the Interior that ten continuous miles of said road are completed, then a quantity of the land hereby granted, not to exceed thirty sections, may be sold, and so on from time to time until said road shall be completed; and if said road is not completed within five years, no further sales shall be made, and the lands remaining unsold shall revert to the United States.

"SEC. 6. *And be it further enacted*, That the United States surveyor-general for the district of Oregon shall cause said lands so granted to be surveyed at the earliest practicable period after said State shall have enacted the necessary legislation to carry this act into effect."

"Approved February 25, 1867." (14 Stats., 409.)

On October 20, 1868, the State of Oregon granted lands specified in the act of Congress of February 27, 1867, to The Dalles Military Road Company by the following act:

"An act donating certain lands to Dalles Military Road Company.

"Whereas at the second session of the Thirty-ninth Congress that body passed an act entitled 'An act granting lands to the State of Oregon to aid in the construction of a military wagon road from Dalles City, on the Columbia River, to Fort Boise, on the Snake River,' approved February 25, 1867, as follows:

(Here appears the act of Congress referred to.)

"*Be it enacted by the Legislative Assembly of the State of Oregon:*

"SECTION 1. That there is hereby granted to Dalles Military Road Company, incorporated, as it appears by the articles of incorporation filed in the office of the Secretary of State on the 30th day of March, 1868, all lands, right of way, rights, privileges, and immunities heretofore granted or pledged to this State by the act of Congress in this act heretofore recited for the purpose of aiding said company in constructing the road mentioned and described in said act of Congress upon the conditions and limitations therein prescribed.

"SEC. 2. There is hereby granted and pledged to said Dalles Military Road Company all moneys, lands, rights, privileges, and immunities which may be hereafter granted to this State to aid in the construction of such road for the purposes and upon the conditions mentioned in said act of Congress, or which may be mentioned in any further grants of money or lands to aid in constructing said road.

"SEC. 3. The said Dalles Military Road Company is hereby authorized to locate the lands mentioned in the fourth section of the above-recited act, subject to the approval of the governor.

"Approved October 20, 1868."

(Session Laws of 1868, p. 3.)

Argument and Brief.

First.

The lands in controversy were not excepted from the grant to the State of Oregon by reason of the Northern Pacific Railroad Company having filed its map of general route on August 13, 1870; nor by filing the Perham map.

It will be remembered that the grant to the State of Oregon was made on February 25, 1867; that the wagon road in aid of which the grant was made was constructed and completed prior to the 23d day of June, 1869; that the Governor of Oregon had, on July 23, 1869, certified that the road had been definitely located and constructed and completed; that the map of the constructed road and the Governor's certificate of its completion had been filed in the Interior Department prior to December 18, 1869; and the lands embraced within the limits of the grant to the State of Oregon had been withdrawn from settlement and sale on that date.

We contend that the title of the State of Oregon and of its grantees was not affected by the filing of the map of general route on August 13, 1870.

First. Because, being a map of general route only, it had no retroactive effect; and

Second. Because it did not identify the Northern Pacific Railroad Company's grant so that the grant attached to any particular tract of land.

It has been repeatedly held that the effect of filing a map of general route is only to withdraw the lands from *future* disposition. It does not cause the grant to attach to any particular tract of land. The grant still remains a floating grant until a map of definite location is filed. It may be admitted that if the Northern Pacific Railroad Company had definitely located its road from Wallula to Portland, its grant as to lands within the limits of its grant in place *not excepted from the grant* would have taken effect and its title would have related back to the date of the grant, and the grant would have attached to specific tracts of land.

But in the present case it is alleged in the complaint, and not denied by the answer, that "the line of the road of said Northern Pacific Railroad Company between Wallula and Portland, or to a point opposite Portland, was never surveyed; that the line of said road between the said points was never definitely located or fixed by the said company; that no map of the definite location of said road was ever filed in the office of the Commissioner of the General Land Office at Washington City, or in the Interior Department; that said Northern Pacific Railroad Company never constructed any portion of its said road between said town of Wallula and said city of Portland."

So that there is no question in these cases about the character of the map filed on the 13th day of August, 1870; and we claim that the right of the wagon road

company to the lands in question was not impaired, nor the status of the lands affected, by that map; that the question, therefore, to be considered in these cases is not what lands the Northern Pacific Railroad Company would have acquired, if it had definitely located and constructed its road between Wallula and Portland, but what rights it acquired, if any, by filing a map of general route, and whether the filing of said map segregated any lands from the public domain or prevented them from passing to the Dalles Military Road Company, under the grant to the State of Oregon.

We think this question has been substantially decided by the Supreme Court of the United States in several cases. In Kan. Pac. Ry. Co. *v.* Dunmeier (113 U. S., 636), Mr. Justice Miller, in delivering the opinion of the Supreme Court, said:

"The record shows that while the company did not file its line of definite location until about two months after Miller had made his homestead entry, it did designate the general route of said road and file a map thereof in the General Land Office, on July 11 of the same year, 1866, which was fifteen days before the homestead entry."

Again, he said, speaking of the rights acquired by the railroad company by filing a map of general route of its road:

"What were those rights? This action does not, like the filing of the line of definite location, vest in the company a right to *any specific piece of land.* It establishes no claim to any particular section with an odd number."

And in United States *v.* Southern Pacific Ry. Co. (13

Sup. Ct. Rep., 157; 146 U. S., 600–1), Mr. Justice Brewer, in announcing the opinion of the Supreme Court, said:

"A distinction between the line of definite location and the general route is well known. It was clearly pointed out in the case of Butts *v.* R. R. Co. (119 U. S., 55; 7 Sup. Ct. Rep., 100.) The act under consideration in that case was that of July 2, 1864 (13 Stat., 365), making a grant to the Northern Pacific Railroad Company."

And, again, he said:

"The act of Congress not only contemplates the filing by the company in the office of the Commissioner of the General Land Office of a map showing the distinct location of its road, and limits the grant to such alternate sections as have not been reserved, sold, granted or otherwise appropriated, and are free from pre-emption grant or other claims or rights, but it also contemplates a preliminary designation of the general route of the road, and the exclusion from sale, entry or pre-emption of adjoining odd sections within forty miles on each side until the definite location is made."

And he further says:

"The map which was filed on April 3, 1871, was simply one of *general route*, and therefore did not work a designation of the tracts of land to which the Southern Pacific's grant attached."

In the case of Kan. Pac. R. R. Co. *v.* Atlantic R. R. Co. (112 U. S., 422), the court said:

"The line of the road * * * was not definitely fixed until 1866. Until then the appropriation of lands, even within the limits of the grant * * * was in

no respect an impairment of its rights. * * * The order of the withdrawal of lands along 'the probable line' of the defendant's road, made on the 19th of March, 1863, by the Commissioner of the General Land Office, affected no rights which it would have acquired to the lands, nor in any respect controlled the subsequent grant."

Mr. Justice Brewer, in delivering the opinion of the Supreme Court in the case of St. Paul, etc., Co. *v.* Greenhalgh (26 Fed., 565), said:

"The complainant took nothing by the withdrawal. A withdrawal passes no title. It only prevents other titles from accruing."

In the case of the Wis. Cent. R. R. Co. *v.* Price (133 U. S., 496–519), the court, in discussing the effect of the filing of a map of general route, at page 509, said:

"The title conferred by the grant was necessarily an imperfect one. Because until the lands were identified *by the definite location* of the road it could not be known what specific lands would be embraced in the sections named. The grant was, therefore, until such location, *afloat.*"

And Mr. Justice Brewer, in the case of Sioux City, etc., R. R. Co. *v.* Griffey (143 U. S., 32–41), on pages 38, 39, said:

"The first and principal question is, at what time the title of the company attached, whether at the time the map of definite location was filed in the General Land Office at Washington, or when, prior thereto, its line was surveyed and staked out on the surface of the ground. * * * The fact that the company has surveyed and staked a line upon the ground does not conclude it.

It may survey and stake many, and finally determine the line upon which it will build by a comparison of the cost and advantages of each, and only when, by filing its map, it has communicated to the Government knowledge of its selected line, is it concluded by its action. Then, so far as the purposes of the grant are concerned, is its line *definitely fixed;* and it can not, therefore, without the consent of the Government, change that line so as to affect titles accruing thereunder."

In the case of the United States *v.* The Southern Pacific Ry. Co. (13 Sup. Ct. Rep., 152; 146 U. S., 570), which was a suit concerning lands between the overlapping limits of the grant to the Atlantic & Pacific Railroad Company, and a grant to the Southern Pacific Railway Company, in which the grant to the Atlantic & Pacific was the prior grant, but the definite location of its road was subsequent to the definite location of the road of the Southern Pacific, and in which grant to the Southern Pacific there had been inserted the following proviso: "*Provided, however,* That this section shall in no way affect or impair the rights, present or prospective, of the Atlantic & Pacific Railroad Company, or any other railroad company," it was held that the grant to the Atlantic & Pacific being a prior grant, and the line of its road having been definitely located, its title related back to the date of the grant, and it took the lands within the conflicting limits of the two grants, in preference to the Southern Pacific Company. Mr. Justice Brewer, in announcing the decision of the Supreme Court, said:

"The question is asked, supposing the Atlantic &

Pacific Company had never located its lines west of the Colorado River, would not these lines have passed to the Southern Pacific Company under its grant? *Very likely that may be so.* The language of the Southern Pacific Company's grant is broad enough to include all lands along its line; but if the grant to the Atlantic & Pacific Company had never taken effect, it may be that there is nothing which would interfere with the passage of the title to the Southern Pacific Company."

As the definite location of the line of the road of the Northern Pacific Railroad Company, from Wallula to Portland, was never made, the grant to the Northern Pacific never took effect as to any land alleged to have been granted in aid of the line from Wallula to Portland, and it can not be affirmed or established as a matter of law or fact that a single section of land was granted to the Northern Pacific for that portion of its road, or at least any particular section, and therefore it can not be shown that any portion of the lands embraced within the grant to the State of Oregon were ever granted to or reserved for the Northern Pacific Railroad Company.

The Perham Map.

Were the lands in question withdrawn by operation of law upon the transmission to the Secretary of the Interior of the Perham map in 1865, so as to except them from the operation of the grant to the State of Oregon made by the act of February 25, 1867?

That the Perham map was not executed in accordance with the requirements of the statute and the regulations

of the Department, and was not accepted or filed by the Department of the Interior, and that no withdrawal of lands on account thereof was made, appears from the correspondence concerning the same, made exhibits to the answer. The Perham map purported to be a map of the main line of the road of the Northern Pacific Railroad Company from Lake Superior to Puget Sound. The act of July 2, 1864, required the main line of said road to be located and constructed upon the most eligible route between those points. As was said by Mr. Justice Harlan, in delivering the opinion of the Supreme Court of the United States in United States *v.* Northern Pacific R. R. Co. (14 Sup. Ct. Rep., 598; 152 U. S., 284):

"The road should be constructed upon the most practicable line. Any unnecessary deviation from such line would not be deemed within the contemplation of the grantor, and would be rejected as not in accordance with the grant."

The decision of the Supreme Court in this case seems conclusive that the Perham map was properly rejected by the Department. In delivering the opinion of the court, Mr. Justice Harlan said:

"Although that act allowed the company to adopt the most eligible route within the territory of the United States, north of the forty-fifth degree of latitude, it is clear that Congress contemplated the construction of a main trunk line between Lake Superior and Puget Sound which would not touch any point 'at or near Portland,' and the western end of which would be east and northeast of a direct line between Portland and Puget Sound; and, in addition, a branch line leaving the main trunk line, at some suitable place, not more than 300 miles

from its western terminus, and extending 'via the valley of the Columbia River to a point at or near Portland. If the main line, as originally indicated by the act of 1864, had been established on the route between Portland and Puget Sound, the branch line could not have left the main line at some point not more than 300 miles from its western terminus, and extended via the valley of the Columbia River to a point at or near Portland. The authority given to the company to adopt the most eligible route did not authorize it, by a map of general route, to cover an unlimited extent of country north of the forty-fifth degree of latitude. On the contrary, as said in St. Paul & P. R. Co. *v.* Northern Pac. R. Co. (130 U. S., 1, 13; 11 Sup. Ct., 389), 'When the termini of a railroad are mentioned, for whose construction a grant is made, the extent of which is dependent upon the distance between those points, the road should be constructed upon the most direct and practicable line. No unnecessary deviation from such line would be deemed within the contemplation of the grantor, and it would be rejected as not in accordance with the grant.' It may be that the indefiniteness of the map of general route presented by the Northern Pacific Railroad Company in 1865 constituted the reason why that map was not accepted by the Interior Department. Besides, it is not found as a fact in this case that the most eligible railroad route for the main line, between Lake Superior and Puget Sound, looking at the purpose of Congress in making the grant of 1864, was down the Columbia River and via some point at or near Portland. It is clear that the purpose of Congress, by the act of 1864, was not to connect Portland with Puget Sound by a road established upon the most direct or eligible route between those places, but, so far as Portland and its vicinity were concerned, to connect them with the east by a branch road, through the valley of the Columbia River, that

would strike the main trunk line connecting Puget Sound and Lake Superior. There was no purpose, by that act, to make a grant of lands for a road to be located and constructed from a point 'at or near Portland' to Puget Sound."

In the case at bar it does not appear that the line traced on the Perham map was the most eligible route for the main line of the company's road between Lake Superior and Puget Sound.

The question of the validity and effect of the Perham map is thoroughly and ably discussed in the brief of counsel for appellants in the case of the United States *v.* The Oregon and California R. R. Co., John A. Hurlburt and Thomas L. Evans, lately decided by the Circuit Court of Appeals, and we take the liberty of incorporating the following portion of their argument applicable to this case in this brief:

"We claim that the lands in suit were in nowise affected by the Perham map, for all of the following reasons:

"(*a*) It showed two different lines of a road to Puget Sound—but did not designate either, even alternately, for a route.

"(*b*) It did not pretend to designate a route which the company had 'determined' upon or 'fixed.'

"(*c*) It was not accepted by the United States.

"(*d*) The Commissioner's rejection is conclusive as to the Northern Pacific Company, because it acquiesced and did not appeal. The United States, having sustained no wrong thereby, could not have complained of

its own action at the time, in a direct proceeding—and should not, at this late day, be heard to complain collaterally.

"(*e*) The Northern Pacific Act did not provide for, nor contemplate, the withdrawal of any land from liability to subsequent *grant*, made before definite location.

"(*a*) The first section of the act of 1864 authorized the Northern Pacific Company to construct its *main road* 'by the most eligible railroad route' north of the forty-fifth degree of latitude, from Lake Superior to Puget Sound, and also to construct a branch road down the valley of the Columbia River to a point near Portland.

"The Perham map shows several different lines, without even expressing a preference between them. Two routes, starting at different points on Lake Superior, are brought together in Montana, at a point marked 'A' on the map. One of those lines is marked 'a practicable railroad as surveyed by Governor Stevens,' and the other as 'worthy an examination for a railroad route.'

"From 'K,' in Washington, a line extends northwest to 'H,' on Puget Sound—and another line is drawn from 'K' southwesterly along the course of the Columbia River to Vancouver, thence north to the point 'H,' on Puget Sound.

"The Northern Pacific Company did not by this, nor by any map filed prior to the Joint Resolution of 1870, offer to designate a route for the *branch-line road.* It wanted to build a road which would connect Portland, Puget Sound, and Lake Superior; but had no authority to extend its branch line beyond Portland, and the act of 1864 terminated the main line at Puget Sound. Had the company been assured that, by waiving the branch-line provisions, the main-line road could be built down the Columbia River to Portland, thence to Puget Sound,

it may be that it would have adopted the Columbia River line; but it is apparent that the company could not make a map committing itself to the adoption of a fixed line for either the branch or main road, as such, without thereby illustrating that it had no authority to build a road from Portland to Puget Sound. The act fixed the terminus of the main road at Puget Sound, and the terminus of the branch at a point near Portland, and when either road reached the prescribed terminus it must stop there; and the theory out of which the Perham map evidently arose, was that the company might, by waiving its *branch-line* authority, build its *main line* to Puget Sound by way of Portland.

'It was for these reasons, we believe, that the Perham map made equivocal and alternative designations of route.

"It is contended * * * that the Perham map made a valid designation from 'K' to Vancouver of the *branch-line* road, nothwithstanding it was made and filed as a general route map of the *main-line* road to Puget Sound by way of Vancover; because the same company, at that time, had the right to make and file a general route map, designating for its branch road the identical route from 'K' to Vancouver, shown on this map. The vice of such contention, it seems to us, arises out of contemplating the privileges and rights conferred as a unit of grant—because the beneficiary thereof is the same corporation.

"Suppose the act had authorized the Northern Pacific Company to construct a road by the most eligible route, from Lake Superior to Puget Sound; and another company to construct a branch road from 'K' to Portland. It certainly could not be claimed that such other company would be bound by, or entitled to any benefits from, the Northern Pacific's designation of a line of route from 'K' to Puget Sound by way of Portland; nor that the

Northern Pacific could designate such a route at all. While the fact that in one instance the Northern Pacific Company was, and in the other was not, the beneficiary of the two grants, would make a difference in considering the quantity of grant made to that company, it should not make any difference in considering the grants themselves, as such.

"Nothing is claimed here by or for the Northern Pacific Company. The question here is as to whether the filing of the Perham map, showing a line for the *main road* along an unauthorized route, constituted a designation of the *branch-line* road, in so far as the branch-line road *might have been*, but was not, mapped for such route.

"(*b*) The first section of the act of 1864 authorized the construction of a railroad along a line 'to be *determined* by said company.' Section 3 describes the lands granted in relation to such railroad line 'as said company may *adopt;*' and section 6 provides what shall be done 'after the general route be *fixed.*'

"In the case of Hayes *v.* Parker *et al.* (2 L. D., p 555), considering the provisions of these sections, Secretary Teller said:

> "'The act in question provides for but one line of general route, and one of definite location. It is certainly a very grave question whether legislative withdrawal operates under any preliminary map other than the one which the company *finally determines* shall be the settled and *fixed* general route of the road. If legislative withdrawals operate upon preliminary lines not finally fixed as lines of general route, then we have in this instance a legislative withdrawal of a section of country almost entirely different from that which was finally included in the lines of the general route.'

"It will be remembered that the Perham map was rejected, and no executive withdrawal of any land was

made in pursuance of it. But had it been accepted by the Land Department, who might say what lands it operated to withdraw—those along the direct line from 'K' to 'H,' or those along the line which followed the Columbia River to Vancouver, thence to 'H'? As a matter of fact, the road was not built along either of those lines.

"(c) No executive withdrawal was made in pursuance of the Perham map, and we claim that the Perham map did not operate a legislative withdrawal, because, among other reasons, it was not *accepted* by officers of the United States.

"We know of no case the decision of which depended solely upon the Land Officers' acceptance or rejection of a railroad map. It seems to have been treated as a *matter of course*, throughout the decisions relating to the public lands, that there can be no pre-emption, homestead, or other claim under the laws relating to the public lands, without the co-operation of the Land Department; and, in the same way, it has been frequently said, in effect, that acceptance of the Land Officers is essential to the efficacy of railroad maps.

"The grant made by the act of July 23, 1866, to the St. Joseph & Denver City Railroad Company contained no specific requirement that the company file a map of definite location. The language of the act is:

> "'That there be hereby granted * * * every alternate section of land designated by odd numbers, for ten sections in width on each side of said road, to the point of intersection. But in case it shall appear that the United States have, when the line of said road is definitely fixed, sold,' etc.

"Construing this grant, Mr. Justice Field said:

> "'Until the map is filed with the Secretary of the Interior, the company is at liberty to adopt such a

> route as it may deem best, after an examination of the ground has disclosed the feasibility and advantages of different lines. But when a route is adopted by the company and a map designating it is filed with the Secretary of the Interior, and *accepted* by that officer, the route is established; it is, in the language of the act, "definitely fixed," and can not be the subject of future change, so as to affect the grant, except upon legislative consent.' (Van Wyck *v.* Knevals, 160 U. S., 366.)

"Secretary Smith, in the case of Cole *v.* N. P. R. R. Co. (17 L. D., 9), construing section 6 of the Northern Pacific Act, held:

> "'Said section provided for a legislative withdrawal of lands within the granted limits, upon the filing of a map of general route, which became operative upon the *approval* of the map.'

"Substantially the same language is used by Assistant Attorney General Smith, in his opinion to Secretary Delano, reported at page 377, Copp's Pub. Land Laws (1875 ed.), in which Secretary Delano concurred (p. 380).

"In the case of Buttz *v.* N. P. R. R. Co. (119 U. S., at page 71), Mr. Justice Field said:

> "'The act of Congress not only contemplates the filing by the company in the office of the Commissioner of the General Land Office of a map showing the definite location of the line of its road; * * * but it also contemplates a preliminary designation of the general route of the road. * * * The officers of the Land Department are expected to exercise supervision over the matter, so as to require good faith on the part of the company in designating the general route, and not to accept an arbitrary and capricious selection of the line.'

"(*d*) Section 2273 of the United States Revised Statutes provides that—

> "'Appeals from the decision of the district officers, in cases of contest for the right of pre-emption, shall

be made to the Commissioner of the General Land Office, whose decision shall be final, unless appeal therefrom be taken to the Secretary of the Interior.'

"This section was taken from the act of June 12, 1858, and was very soon after adopted as a rule of practice in respect of all decisions rendered by the Commissioner. Rule 112 of the 'Rules of Practice' provides that:

> "'Decisions of the Commissioner not appealed from within the period prescribed become final, and the case will be regularly closed.' (IV L. D., 49.)

"No appeal was taken for the Northern Pacific Company from the Commissioner's rejection of the Perham map.

* * * * * * *

"In the case of United States *v.* Marshall Mining Co., (129 U. S., at page 587), Mr. Justice Miller, in delivering the opinion, said:

> "'They acquiesced in the proceedings, and made no effort to set aside the patent, or to correct any injustice which had been done them in the proceedings upon which the patent had been issued, while the other parties had full and undisputed possession of the land.
>
> "'It may be said that they could not help themselves, and that this silence and inaction on their part did not imply acquiescence. But they had the *right to appeal* to the Commissioner of the General Land Office from the order of the register and receiver dismissing their application. This was not done, and it never has been done.
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> * * * * * * *
>
> "'All the errors and irregularities which occur in the process of entering and procuring title to the public lands of the United States ought to be corrected within the Land Department, which includes the authority vested in the Secretary of the Interior, so long as there are means of revising the proceedings and correcting these errors. A party can not

be permitted to remain silent for more than eight years after he has abandoned a contest, submitted to the decision of the matter at issue, although it may have been erroneous, and then come forward in a court of equity, after the title has passed from the United States, and seek to correct the errors which may have occurred during the progress of the proceedings in the Land Office.'

"It may be safely said that the Northern Pacific Company could not now maintain a suit, in a court of equity, which depended upon its establishing the validity of the Perham map; and yet, as between the United States and that company, the company, and not the United States, was injured—if any wrong was done by the Commissioner's rejection of the Perham map.

"The Northern Pacific Company asked approval of the Perham map, and that lands of the United States along the lines shown on it be withdrawn. The United States, by the Commissioner, acting without fraud, rejected the map and refused the withdrawal. If any wrong was done it was *by* the United States, and *against* the company. The company might have complained, but did not; but the courts were at all times closed against the United States, for it had *no wrong to redress.*

* * * * * * *

"(*e*) Nearly all of the railroad land grants provide that there shall be a withdrawal of lands, when a map of general route is filed; but the Northern Pacific Act does not. The words of section 6, 'and the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption,' relied upon as operating a withdrawal, are words of *exclusion* from sale, entry, and pre-emption; and are not equivalent to a statutory *withdrawal* from market.

"In the case of Kan. Pac. Co. *v.* Dunmeyer (113 U. S., 629–644), the decision depended upon whether the land

in suit was withdrawn from *homestead entry* by a railroad grant, which provided a withdrawal of lands, upon general route designation, from 'sale' only. It was held (at page 638):

> "'This act declared that the lands along the entire line, so far as the same may be designated, shall be reserved from "*sale*" by order of the Secretary of the Interior. The lands, therefore, were to be reserved from *sale only*, and not from pre-emption or homestead claims.'

"An analysis of the act of 1864, considered in view of the Joint Resolution of 1870, makes it evident, beyond the plain meaning of the words employed, that Congress did not intend that any lands should be reserved from such subsequent *grant* as it might see fit to make, prior to definite location of the Northern Pacific grant.

* * * * * * *

"All lands 'granted' prior to definite location are excepted—and it is provided that the company shall have other lands in lieu of those 'granted.' Section 6 provides that the lands shall not be subject to 'sale, or entry, or pre-emption'; but does not exclude them from subsequent *grant*.

* * * * * * *

"Notwithstanding the lands were withdrawn upon general route designation from pre-emption, entry, and sale, persons who settled upon such lands prior to the withdrawal might thereafter pre-empt, enter, and purchase the same—but the withdrawal reserved the land from liability to pre-emption, entry, or sale, founded upon settlement initiated after withdrawal. And so it was the act provided that the company should have other lands for such as were pre-empted, entered, or sold prior to definite location. But the act also provided that the company should take other lands for such as were 'granted' or 'reserved' prior to definite location.

"If, upon general route designation, the lands were withdrawn from the power of Congress to grant them to, or reserve them for, another company, then what did the act mean by saying that the company shall take other lands for those *granted* or *reserved* prior to definite location?"

Opinion of the Circuit Court of Appeals in the case of the Oregon and California Railroad Company vs. United States. (77 Fed. Rep., 67.)

These cases against Wilcox and Messinger were heard together in the Circuit Court of Appeals for the Ninth Circuit, but no opinion was delivered by the court except this:

HAWLEY, District Judge:

"Both of these cases present the identical questions that were involved in the case of the Oregon and California Railroad Company *v.* United States (77 Fed., 67), and are necessarily controlled by the decision in that case. We adhere to the views therein expressed, and upon the authority of that case the judgments and decrees in these cases are reversed, with instructions to the Circuit Court to enter a decree in favor of complainant in each case."

For the information of the court, and as part of our argument, we here present the opinion of the court in that case:

Before MCKENNA and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge:

"The case is this: By the act of Congress of July 2, 1864 (13 Stat., 365), the Northern Pacific Railroad Com-

pany was incorporated, with authority to construct and maintain a continuous railroad and telegraph line—

> " 'Beginning at a point on Lake Superior, in the State of Minnesota or Wisconsin, thence westerly by the most eligible railroad route, as shall be determined by said company, within the territory of the United States, on a line north of the 45th degree of latitude, to some point on Puget Sound, with a branch via the valley of the Columbia River, to a point at or near Portland, in the State of Oregon, leaving the main trunk line at the most suitable place, not more than three hundred miles from its western terminus.'

"And granting to the company, in aid thereof, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections of land per mile on each side of its line, as the company should adopt through the Territories of the United States, and ten alternate sections per mile where the road passes through any State—

> " 'And whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections.'

" The sixth section of the act provided that:

> " 'The President of the United States shall cause the lands to be surveyed for forty miles in width on

both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption before or after they are surveyed, except by said company, as provided in this act.'

"On the 6th day of March, 1865, Josiah Perham, as president of the Northern Pacific Railroad Company, addressed to the Secretary of the Interior the following letter:

"'WASHINGTON, D. C., *March 6, 1865.*

"'Hon. J. P. UPSHER,

"'*Secretary of the Interior:*

"'SIR: Under authority from the board of directors of the Northern Pacific Railroad Company, I have designated on the accompanying map, in red ink, the general line of their railroad from a point on Lake Superior, in the State of Wisconsin, to a point on Puget Sound in Washington Territory, via the Columbia River, adopted by said company as the line of said railroad, subject only to such variations as may be found necessary after more specific surveys; and I respectfully ask that the same may be filed in the office of the Commissioner of the General Land Office, together with a copy of the charter and organization of said company, and that under your directions the lands granted to said company may be marked and withdrawn from sale in conformity to law.

"'I am, respectfully, your obt. servt.,

"'JOSIAH PERHAM,

"'*Prest. N. P. R. R. Company.*'

"Accompanying this letter was a map, upon which was traced, in red ink, a line indicated by the letters 'H, J, K, L, M, A, B, C,' and extending from Lake Superior to Puget Sound, and along which was written this explanatory statement: 'H, J, K, L, M, A, B, C, is practicable

railroad, as surveyed by Governor Stevens.' On the 9th of March, 1865, the then Secretary of the Interior, Mr. Upsher, addressed to the Commissioner of the General Land Office the following letter:

"'DEPARTMENT OF THE INTERIOR.

"'WASHINGTON, D. C., *March 9th, 1865*

"'SIR: Herewith I transmit a map upon which the "general line" of the Northern Pacific Railroad, as adopted by the board of directors of that railroad company, is delineated; also a copy of the letter of the president of said company, dated the sixth instant, requesting that the granted lands along said line be withdrawn from market. In view of the provisions of the 3d and 6th sections of the act of Congress approved July 2, 1864 (Pamphlet Laws, pages 368, 369), should you perceive no objection, I think that the odd-numbered sections along the line for ten miles in width on each side, in Minnesota and Wisconsin, and for twenty miles in width on each side along that part of the line extending through the Territories westward to Puget Sound, may be withdrawn as requested, as preliminary to the final survey and location of said railroad. The even-numbered sections along the line will, however, be subject to disposal by the United States, as provided in the 6th section of said act of Congress.

"'Very respectfully, your o'bt servant,

"'J. P. UPSHER, *Secretary.*

"'The Commissioner of the General Land Office.'

"Mr. Harlan having, shortly after, succeeded Mr. Upsher as Secretary of the Interior, the Commissioner of the General Land Office, on June 22, 1865, addressed to him a letter, stating, in substance, that Secretary Upsher had, under date of March 9, 1865, sent to the General Land Office a diagram showing the proposed route of the Northern Pacific Railroad Company, which diagram had been filed in the Secretary's office, accompanied by a request for the withdrawal of the land along such

route; that, as no withdrawal had been ordered by Secretary Upsher, no action was taken in the General Land Office upon the application, and that as Mr. Perham, president of the company, had called attention to the matter, the Commissioner, while proceeding to state objections to the diagram, and his reasons for thinking no withdrawal for the benefit of the company should be made, asked for such directions as the Secretary should deem proper in the premises. Among the objections urged by the Commissioner was this: That the diagram presented to and filed with the Secretary did not constitute such a map of the general route of the proposed road as was required by law and the rules of the Land Department. That these required 'a connected map showing the exact location; the map indicating by flagstaffs the progress of the survey; the map to be authenticated by the affidavit of the engineer, with the approval of the accredited chief officer of the grantee.' And that, in the judgment of the Commissioner, no withdrawal should be ordered until such a map is filed in the General Land Office. These views of the Commissioner, so far as the record shows, were acquiesced in by the Secretary of the Interior, as well as by the Northern Pacific Railroad Company; for nothing further, so far as appears, was ever done with or under the Perham map or diagram.

"On the 25th of July, 1866, Congress made a grant to the Oregon & California Railroad Company, in aid of the construction of a line of railroad and telegraph beginning at the city of Portland, Oregon, and extending thence southerly through the Willamette, Umpqua, and Rogue River valleys to the southern boundary of that State, there to connect with a line of railroad and telegraph to be built from a point on the Central Pacific Railroad, in the Sacramento Valley, in California, to the point of connection at the Oregon line. (14 Stat., 239.)

The grant was of every alternate section of public land, not mineral, designated by odd numbers, to the amount of 20 alternate sections of land per mile (10 on each side) of the designated line, with the provision usually found in such grants, for the selection of indemnity lands within defined limits for such sections, or parts of sections, within the primary limits, as shall be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of. On October 29, 1869, the Oregon and California Railroad Company duly filed in the office of the Commissioner of the General Land Office its map of definite location, showing that portion of the surveyed line it was by the act of July 25, 1866, authorized to build from Portland southerly to the California boundary, and extending beyond and opposite the lands here in controversy. The map so filed was accepted, and by direction of the Secretary of the Interior the Commissioner of the General Land Office, on the 31st day of January, 1870, ordered the withdrawal, for the benefit of the Oregon & California Railroad Company, from sale or location, pre-emption, or homestead entry, all the odd-numbered sections within 20 and 30 miles of the designated line of road. The Oregon & California Railroad Company proceeded to construct the road along the line so designated, and having completed it, it was inspected by commissioners appointed for the purpose by the President; and, having been found by him to have been constructed in accordance with the terms of the grant, patents were afterwards, and prior to the commencement of this suit, issued to the Oregon & California Railroad Company for the lands in controversy. Nothing was done by the Northern Pacific Railroad Company under its grant, except the filing of the Perham map or diagram, together with the accompanying letter of the president of that company, and his request for the withdrawal of the lands

along its line for its benefit, prior to the definite location of the route of the Oregon & California Railroad Company on October 29, 1869. In the year following, to wit, May 31, 1870, Congress passed a Joint Resolution, by which among other things, the Northern Pacific Railroad Company was authorized—

> " 'To locate and construct, under the provisions and with the privileges, grants, and duties provided for in its act of incorporation, its main road to some point on Puget Sound via the valley of the Columbia River, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound; and in the event of there not being in any State or Territory in which said main line or branch may be located, at the time of the final location thereof, the amount of lands per mile granted by Congress to said company, within the limits prescribed by its charter, then said company shall be entitled, under the directions of the Secretary of the Interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in such State or Territory, within ten miles on each side of said road, beyond the limits prescribed in said charter, as will make up such deficiency, on said main line or branch, except mineral and other lands as excepted in the charter of said company of eighteen hundred and sixty-four, to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of subsequent to the passage of the act of July two, eighteen hundred and sixty-four. And that twenty-five miles of said main line between its western terminus and the city of Portland, in the State of Oregon, shall be completed by the first day of January, Anno Domini eighteen hundred and seventy-two, and forty miles of the remaining portion thereof each year thereafter until the whole shall be completed between said points.' (16 stats., 378.)

"By this resolution, as said by Mr. Secretary Lamar in Railroad Co. *v.* McRae (6 Land Dec., Dep. Int., 400)—

> "'The designations of the lines of the road were changed. That which by the granting act was known as the "branch line" (via the valley of the Columbia River to a point at or near Portland, in the State of Oregon) was changed to "main road" or "main line," and that which had been designated as "main line' (across the Cascade Mountains to Puget Sound) was changed to "branch line." So, by the Joint Resolution of 1870 (May 31st), the company was authorized to locate and construct its main line via the Columbia River, through some point at or near Portland, Oregon, to a suitable point on Puget Sound, with the privileges, grants, and duties provided for in the act of incorporation.'

"After the passage of the Joint Resolution of May 31, 1870, to wit, on August 4, 1870, two maps, designating the general route of its road, were filed by the Northern Pacific Railroad Company in the General Land Office, upon which orders of withdrawal of the lands along the line indicated thereby were made, respectively, August 13, 1870, and October 27, 1870, within the limits of which withdrawals are the lands afterwards patented to the Oregon & California Railroad Company, and here involved. The Northern Pacific Railroad Company never filed any map of definite location of the line it was authorized to build opposite the lands in controversy, and never built such line; and, for its failure in this respect, Congress, by the act of September 29, 1890 (26 Stat., 496), forfeited whatever rights, if any, the company had to the lands here in question, and by the present suit the Government seeks to cancel the patents therefor, which were issued to the Oregon & California Railroad Company.

"That the Oregon & California Railroad Company got nothing by the forfeiture of September 29, 1890, is clear, for the forfeiture declared was for the benefit of the Gov-

ernment only. (U. S. *v.* Southern Pac. R. Co., 146 U. S., 570; 13 Sup. Ct., 152.) And if the grant to the Northern Pacific Railroad Company ever attached to the lands in controversy, or if they were withdrawn from the mass of the public lands for the benefit of that company at the time the grant to the Oregon & California Railroad Company became effective, it is clear that they were not embraced by that grant, and that the patents therefor should be annulled. The real question in the case, therefore, is, Did the lands in question ever become affected by any grant to the Northern Pacific Railroad Company? If they were public lands, not mineral, and not granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, at the time of the grant to the Oregon & California Railroad Company, and at the time of the filing of the map of definite location of the route of that company's road along and opposite to them, it is obvious that they would be embraced by the grant to that company, and can not be affected by any grant contained in the subsequent Joint Resolution of Congress of May 31, 1870. That resolution, as held by the Supreme Court in the case entitled U. S. *v.* Northern Pac. R. Co. (152 U. S., 284, 294, 297; 14 Sup. Ct., 598, 602, 603), contained a new grant to the Northern Pacific Railroad Company, but did not embrace any public land disposed of after the passage of the act of July 2, 1864. The Joint Resolution of May 31, 1870, and the proceedings taken thereunder by the Northern Pacific Railroad Company have therefore no bearing whatever on the question in this case, and the effect given by the court below to the maps filed by the Northern Pacific Railroad Company under and pursuant to the provisions of that resolution constitutes one of the errors into which the court below fell in its consideration and decision of the case.

"The only thing remaining in the case that could take the lands in controversy out of the mass of public lands

to which the grant of 1866 to the Oregon & California Railroad Company applied, is the preceding grant to the Northern Pacific Railroad Company of July 2, 1864, and the Perham map or diagram filed thereunder. It is not pretended that any order of withdrawal was made by any officer of the Land Department based on that map. Was it sufficient, taken in connection with the act of July 2, 1864, to constitute a statutory withdrawal of the lands in question for the benefit of the Northern Pacific Railroad Company? It was not, for at least two very substantial and obvious reasons. Upon its face, as well as by the letter accompanying it, from the president of the Northern Pacific Railroad Company, of date March 6, 1865, it purported to be a designation of the general route of a railroad from a point on Lake Superior, in the State of Wisconsin, via the valley of the Columbia River, to Puget Sound, in the State of Washington, which the letter of its president stated the company had adopted as the line of its road. This was not the line the Northern Pacific Railroad Company was authorized by the act of July 2, 1864, to locate and build. The line authorized by that act, and in aid of which that grant was made, extended, as has been seen, from a point on Lake Superior, in the State of Minnesota or Wisconsin, westerly, by the most eligible railroad route, on a line north of the forty-fifth degree of latitude, and within the territory of the United States, to some point on Puget Sound, with a branch via the valley of the Columbia River to a point at or near Portland, in the State of Oregon; leaving the main trunk line, at the most suitable place, not more than 300 miles from its western terminus. (13 Stat., 365; U. S. *v.* Northern Pac. R. Co., 152 U. S., 284; 14 Sup. Ct., 601.) As said by the Supreme Court in the case just cited—

> "'Although that act allowed the company to adopt the most eligible route, within the territory

> of the United States, north of the forty-fifth degree of latitude, it is clear that Congress contemplated the construction of a main trunk line between Lake Superior and Puget Sound, which would not touch any point "at or near Portland," and the western end of which would be east and northeast of a direct line between Portland and Puget Sound, and in addition, a branch line leaving the main trunk line, at some suitable place, not more than three hundred miles from its western terminus, and extending "via the valley of the Columbia River to a point at or near Portland." If the main line, as originally indicated by the act of 1864, had been established on the route between Portland and Puget Sound, the branch line could not have left the main line at some point not more than three hundred miles from its western terminus, and extended via the valley of the Columbia River to a point at or near Portland. The authority given to the company to adopt the most eligible route did not authorize it, by a map of general route, to cover an unlimited extent of country, north of the forty-fifth degree of latitude. On the contrary, as said in St. Paul & P. R. Co. *v.* Northern Pac. R. Co. (139 U. S. 1, 13; 11 Sup. Ct., 389–393), "when the termini of a railroad are mentioned for whose construction a grant is made, the extent of which is dependent upon the distance between those points, the road should be constructed upon the most direct and practicable line. No unnecessary deviation from such line would be deemed within the contemplation of the grantor, and would be rejected as not in accordance with the grant." '

"The indefiniteness of the Perham map or diagram, which is so manifest on its face, was alluded to by the Supreme Court, in the same case (152 U. S., 292; 14 Sup. Ct., 601), in these words:

> " 'It may be that the indefiniteness of the map of general route presented by the Northern Pacific Railroad Company in 1865 constituted the reason why that map was not accepted by the Interior Department.'

"So it was, as has already been shown. The fact that upon its face it did not purport to be anything more than a mere sketch or diagram, unauthenticated by any engineer or officer charged with the duty of designating such a route, coupled with the fact that it was not only not accepted, but was rejected, by the Land Department of the Government, as insufficient to properly designate the general route of the road the company was by the act of Congress authorized to build, constitutes a second reason why the granting act did not itself operate to withdraw the lands in controversy for the benefit of the Northern Pacific Railroad Company. They, therefore, remained public lands, to which the subsequent grant to the Oregon & California Railroad Company might apply, unless it be that the grant contained in the act of July 2, 1864, in and of itself, without any designation of the route of its road by the grantee, the Northern Pacific Railroad Company, operated to withdraw the lands in controversy from the mass of public lands. And, if these lands, why not all other public lands within the territory of the United States, situated north of the forty-fifth degree of latitude, and between the termini named in the act? It would be difficult to maintain any distinction in this respect between any of the public lands, not mineral, situated in the immense belt through and along which the Northern Pacific Railroad Company might have located and constructed its road.

"The court below, in its opinion, held that:

> "'It might definitely locate its line in good faith, in compliance with the requirement of the act, and by such location select and acquire the lands within the place limits upon both sides of its line. It is unimportant that the company never exercised this power.'

"In holding that it is unimportant that the Northern Pacific Railroad Company never exercised its right to

locate and build its road along and opposite to the lands in controversy, the court below committed its second error. It is said that the grant contained in the act, in and of itself, was an 'an appropriation of the public lands.' Of what public lands? Of all the public lands situated within that immense belt through and along which the Northern Pacific Railroad Company was authorized to locate and build its road? Manifestly, if, prior to any designation by the grantee company of the line of road it was authorized to locate and build, the act making the grant, in and of itself, operated as an appropriation of any particular land, it operated as an appropriation of all public lands within the United States situated north of the forty-fifth degree of latitude, and between the termini named in the act; for, prior to some designation of the route, it could not be known where the grantee company would find the most eligible railroad route, along which route it was authorized to build. We repeat, therefore, that prior to the designation of some route, no distinction can be made between any of the public lands not mineral, situated in the belt through and along which the Northern Pacific Railroad Company might have located and constructed its road. Is it possible that all of that immense body of public land was, by the act of July 2, 1864, in and of itself, without any designation by the grantee company of the line of its road, withdrawn from subsequent grants? Undoubtedly not. In the case of U. S. *v.* Southern Pac. R. Co. (146 U. S., 570; 13 Sup. Ct., 152), the Supreme Court said that the intent of Congress in all railroad land grants, as has been declared by that court again and again, was that such grants shall operate at a fixed time, and shall take only such lands as at that time are public lands. And in respect to this very grant of July 2, 1864, the Supreme Court, in the case of U. S. *v.* Northern Pac. R. Co. (152 U. S., 296; 14 Sup. Ct., 598, 603), in express

terms declared that it embraced only public lands to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time its line of road was definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office. As it is not pretended that any such line, in so far as concerns the lands here in controversy, ever was definitely fixed, how that grant, in and of itself, without any designation of the required route, can be held to embrace these lands, we are unable to understand. It requires an act of the grantee to give precision to such grants, and to identify by the location of its road the lands embraced by the grant. When that is properly done, the grant attaches thereto, and becomes effective as of its date; but, until there is some designation of route by the grantee, there is nothing to segregate any particular land from the mass of public lands, and manifestly, if such segregation never occurs, those that otherwise might be covered by the grant remain public lands, and subject to any other valid grant that Congress may have made embracing them. The grant of July 2, 1864, to the Northern Pacific Railroad Company never having taken effect, so far as concerns the lands in controversy in this suit, they were public lands at the time of the grant to the Oregon and California Railroad Company, and at the time of the definite location by that company of the road it was authorized to build along and opposite to them; and falling as they do within the terms of that grant, and having been earned by and patented to that company, the judgment is reversed and the cause remanded, with directions to the court below to dismiss the bill."

Second.

There is another reason why the Eastern Oregon Land Company (the appellant) is entitled to recover in this suit, but which was not considered by the Circuit Court of Appeals because it was not deemed necessary. The grant to the State of Oregon was for Public Uses.

Was not the grant to the State of Oregon made by the act of February 25, 1867, excepted from the grant to the Northern Pacific?

The only exceptions in the grant to the State were of lands theretofore—that is, prior to February 23, 1876—"reserved to the United States or otherwise appropriated by act of Congress or other competent authority." The grant to the Northern Pacific Railroad Company was of lands on the line of its road to which the United States should have "full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights *at the time the line of said road is definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office.*"

The United States expressly reserved the right *to grant* lands at any time prior to the filing of the map of definite location of the railroad company's line with the Commissioner of the General Land Office, and expressly excepted the lands it *should grant* prior to that time from the railroad company's grant.

We contend that the grant to the State of Oregon was made in pursuance of and in accordance with this reservation of the right of the United States to grant lands,

though they might be found upon the filing of the map of general location of the route of the Northern Pacific Railroad Company's road to be embraced within the limits of the grant to that company, and that lands so granted were expressly reserved from the said company's grant.

In cases of conflicting grants to different railroad companies, the Interior Department, prior to 1878, held that the company which first definitely fixed the line of its road acquired title to the land within overlapping limits. In the case of Oregon & California R. R. Co., (14 L. D., 188), the Secretary of the Interior says: "Under the rulings in force in this Department prior to 1878, it was held that priority of location gave priority of right to lands within conflicting limits, and a large number of tracts were patented to the Oregon & California Company within the conflict now under consideration."

It was while this construction prevailed that the grant of land in controversy was made to the State of Oregon to aid in the construction of a military road. And the strong probability is that Congress then held the same view as the Department of the Interior. Up to that time the Supreme Court had expressed no opinion upon the subject.

In 1878 the decision of the Supreme Court was rendered in the case, Missouri, Kansas, etc. *v.* Kansas Pacific, etc. (97 U. S., 492).

In that case, the court was construing the third section of the act of Congress of July 1, 1862, granting

lands to the Union Pacific Railroad Company, in these words:

"That there be, and is hereby, granted to the said company every alternate section, to the amount of five alternate sections, not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said map is definitely fixed."

In delivering the opinion of the court, Mr. Justice Field says:

"The grant was in the nature of a float, and the reservation excluded only specific tracts to which certain interests had attached before the grant had become definite or which had been specifically withheld from sale *for public uses*, and tracts having a peculiar character, such as swamp lands or mineral lands, the sale of which was then against the general policy of the Government. *It was not within the language or purpose to except from its operation any portion of the designated lands to aid in the construction of other roads.*"

Afterwards, in delivering the opinion of the court in St. Paul & Pacific *v.* Northern Pacific (139 U. S., 1), Justice Field says:

"But independently of this conclusion, we are of opinion that the exception in the act making the grant to the Northern Pacific Railroad Company was not intended to cover other grants for the construction of roads of a similar character, for this would be to embody a provision which would often be repugnant to and defeat the grant itself." (Missouri, Kansas & Texas Railway *v.* Kansas Pacific Railway, 97 U. S, 491, 498, 499.)

The quotations from these two decisions seem to hold that priority in the definite location of a railroad did not give priority of right to lands within conflicting limits. This reversed the rulings of the Land Department in that respect, which had prevailed until 1878.

In neither of these cases was it necessary for the court in coming to a decision to make these declarations. Both of them were decided upon other grounds and for other reasons. In fact, they seem to be mere *obiter dicta*.

But conceding that the rule here laid down by the Supreme Court is correct so far as it concerns grants to different railroad companies, it does not follow that a grant to the State of Oregon to aid in the construction of the Dalles Military Road shall not have priority of right over the grant to the Northern Pacific Railroad Company.

The Supreme Court says, in 139 U. S., 17 (*supra*):

"We are of the opinion that the exception in the act making the grant to the Northern Pacific Railroad Company was not intended to cover other grants for the construction of roads *of a similar character*."

But the Northern Pacific Railroad and the Dalles Military Road are in no sense roads of a similar character. The former is a road belonging to a private corporation, and for its especial benefit. The latter is a public road of the United States, constructed for public uses, and especially for the benefit of the United States.

Military roads have always been constructed at the expense of the United States, and are in the fullest sense *public roads of the United States*.

An examination of the statutes of the United States will show that for several years preceding the civil war, a number of military roads were constructed at great expense by the United States within Oregon and Washington Territories.

By act of Congress of February 17, 1855 (10 Stats. at Large, 608), $30,000 was appropriated to construct a military road from Astoria to Salem.

On March 2, 1857 (11 Stats., 168), $10,000 additional was appropriated.

On June 2, 1858 (11 Stats., 337), $30,000 additional was appropriated to complete the same.

By act of February 6, 1855 (10 Stats., 603) $25,000 was appropriated to construct a military road from The Dalles of the Columbia to Columbia Barracks, and $30,000 to construct a military road from Columbia Barracks to Fort Steilacoom, in Washington Territory.

By act of March 3, 1859 (11 Stats., 434), $100,000 was appropriated to construct a military road from Fort Benton to Walla Walla (known as the Mullan Road).

All these roads, besides others in Oregon and Washington, were constructed under direction of the Secretary of War. They were public and not private roads, and deemed necessary for the protection of the country and to facilitate the movement of troops and munitions of war.

It is a matter of history, of which the court will take notice without proof, that in 1862 extensive gold mines were discovered in what is now known as Canyon City, and conflicts were constantly occurring between the miners and Indians in the vicinity. Troops were sent

to protect the people who had gone thither. Permanent military camps were established at Camp Watson, Camp Harney, and Camp Logan, the former on the trail leading from Dalles City to Canyon City, and the others in the neighborhood of the diggings. There was at the time no road within fifty miles of these military posts, and all supplies had to be transported by pack trains from Dalles City.

Petitions were sent to Congress asking for the construction of a military road from Dalles City to these new diggings, and the result was that Congress passed the act of February 25, 1867 (14 Stats., 409), granting lands to the State of Oregon to aid in the construction of a military road from Dalles City to Snake River. This is the grant which was subsequently transferred by the State to the Dalles Military Road Company, and a part of which is now in controversy in this suit.

Instead of appropriating the money, Congress appropriated certain sections of land to aid in the construction of this military road; but, all the same, this was as much of a *public road* as was the Astoria and Salem Military Road before referred to.

Section 2 of the act granting lands to aid in the construction of the Dalles Military Road provides that "the said road shall be and remain a *public highway* for the use of the Government of the United States, *free from tolls* or other charges upon the transportation of any property, troops, or mails of the United States."

The grant to the State was of the odd-numbered sections, to the extent of three sections in width on each side of said road. As we have said, the only reservation

from the operation of this grant was such land as had heretofore been reserved to the United States or "otherwise appropriated by act of Congress."

The grant to the Northern Pacific Railroad Company was a conditional one, and that company had no interest whatever in it until the definite location of its road. The land was in no sense *appropriated by act of Congress.* It was not intended by Congress in making the grant to the Northern Pacific Railroad Company to withhold any part of these lands from subsequent appropriation, sale, or grant, for public uses, before the line of its road was definitely fixed.

As was said by Mr. Justice Field, in Missouri, etc., Ry. Co. *v.* Kan. Pac. Ry. Co. (97 U. S., 498, *supra*):

"As the sections mentioned could only be known when the route of road was established, which might not be for years, the Government did not intend to withhold the lands in the meantime from occupation and sale, and thus retard the settlement of the country, nor *exclude the land from appropriation for public uses.*"

This is an explicit declaration that the Government reserved the right to appropriate the land in the grant to the Northern Pacific Company, to *public use*, prior to the time when that company should definitely fix the line of its road.

In the act granting lands to the State of Oregon, the fifth section is as follows:

"SEC. 5. *And be it further enacted*, That lands hereby granted to said State shall be disposed of only in the following manner, that is to say, when the governor of said State shall certify to the Secretary of the Interior

that ten continuous miles of said road are completed, then a quantity of the land hereby granted, not to exceed thirty sections, may be sold, and so on from time to time until said road shall be completed; and if said road is not completed within five years, no further sales shall be made, and the lands remaining unsold shall revert to the United States."

The commencement point of the military wagon road was "Dalles City, on the Columbia River," a point within the limits of the grant to the Northern Pacific Company, and the road was necessarily required to run many miles in a southeasterly course through the grant to that company.

As before stated, the public exigency was such that an early construction of the road was required, and five years only given in which to complete the entire road.

In order to provide the means of construction, the fifth section of the act above quoted says that "when the governor of the State shall certify to the Secretary of the Interior that ten continuous miles of said road are completed, then a quantity of the land not exceeding thirty sections may be sold, and so on, from time to time, until said road is completed."

Did Congress intend that a sale of the land under these circumstances should convey a good title to the purchaser? Surely it was not intended to be a delusive sale, and that the vendee took nothing by his purchase of the land!

Congress evidently recognized the validity of the grant to the State of Oregon for the land in controversy when it adopted the Joint Resolution of May 31, 1870,

(16 Statutes at Large, 378), which, among other things, provided as follows:

"And in the event of there not being in any State or Territory in which said main line or branch may be located, at the time of the final location thereof, the amount of lands per mile granted by Congress to said company, within the limits prescribed by its charter, then said company shall be entitled under the directions of the Secretary of the Interior to receive so many sections of land, belonging to the United States, and designated by odd numbers in such state or Territory, within ten miles on each side of said road, beyond the limits prescribed in said charter, as will make up such deficiency on said main line or branch, except mineral and other lands as excepted in the charter of said company of 1864, to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of subsequent to the passage of the act of July 2, 1864."

Congress here provided that the Northern Pacific Railroad Company should have ten additional miles on each side of its road, in which to select lands in lieu of those granted to the State of Oregon, and which had then been withdrawn from sale in behalf of the Dalles Military Road Company.

Third.

There is still another reason why the Eastern Oregon Land Company (the appellee) should recover in this suit, but which was not considered by the court below.

The appellee was a bona-fide purchaser of the land in controversy, and is protected in its rights by the act of March 2, 1896. (29 Stats., 42.)

On June 23, 1869, the Governor of Oregon certified that the road of the Dalles Military Road Company, extending from Dalles City to Snake River, was constructed according to the requirements of the act of Congress approved February 25, 1867. By the fifth section of the act the governor was authorized to make this certificate, as evidence that the company had completed the road and was entitled to the land, including that in dispute.

On December 18, 1869, the Commissioner of the General Land Office, by order of the Secretary of the Interior, withdrew from sale the odd-numbered sections within three miles from each side of the road in favor of the Dalles Military Road Company.

On June 18, 1874, Congress passed the following act in relation to land grants to aid in the construction of military wagon roads in Oregon:

"An act to authorize the issuance of patents for lands granted to the State of Oregon in certain cases.

"Whereas certain lands have heretofore by acts of Congress been granted the State of Oregon to aid in the construction of certain military wagon roads in said

State, and there exists no laws providing for the issuing of formal patents for said lands: Therefore,

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That in all cases when the roads, in aid of the construction of which said lands were granted, are shown by the certificate of the Governor of the State of Oregon, as in said acts provided, to have been constructed and completed, patents for said lands shall issue in due form to the State of Oregon, as fast as the same shall, under said grants, be selected and certified, unless the State of Oregon shall by public act have transferred its interests in said lands to any corporation or corporations, in which case the patents shall issue from the General Land Office to such corporation or corporations upon their payment of the necessary expenses thereof: *Provided*, That this shall not be construed to revive any land grant already expired nor to create any new rights of any kind, except to provide for issuing patents for lands to which the State is already entitled.

"Approved June 18, 1874."

18 U. S. Stat., 80.

On May 31, 1876, Edward Martin, a resident of San Francisco, Cal., having confidence in the truth of the certificate of the Governor of Oregon that the road had been duly constructed, and placing confidence in the order of the Commissioner of the General Land Office withdrawing the lands from sale in favor of the Dalles Military Road Company, and also believing that the act of Congress of June 18, 1874, would be carried into effect by issuance of the patents for the land, purchased these lands in good faith, for the sum of $125,000, from the Dalles Military Road Company.

On August 11, 1884, all these lands, by sundry mesne conveyances from Edward Martin, became vested in the Eastern Oregon Land Company, the appellee.

In August, 1889, a suit was commenced by the United States against the Dalles Military Road Company and the Eastern Oregon Land Company (the appellee) in the United States Circuit Court for the District of Oregon, to declare forfeited to the United States the land granted to the State of Oregon under the act of February 25, 1867. This was in pursuance of an act of Congress of March 2, 1889, providing in certain cases for the forfeiture of wagon-road grants to the State of Oregon, but "saving and preserving the rights of all *bona-fide* purchasers, if any there be."

The Eastern Oregon Land Company filed a plea that it was a *bona-fide* purchaser of the land for a valuable consideration.

This plea was sustained by the Circuit Court and the Circuit Court of Appeals, and the case was appealed by the United States to the Supreme Court, and this court affirmed the decisions of the courts below. (United States *v.* The Dalles Military Road Company *et al.*, 148 U. S., 49.)

The case was decided at the same time and for the same reasons as United States *v.* California, etc., Land Company (148 U. S., 31).

The claim of the appellee as a *bona-fide* purchaser of the land in controversy can not now be questioned; it is *res adjudicata*.

The Supreme Court has decided that—

"The right to a patent once vested is equivalent, as

respects the Government dealing with the public lands, to a patent issued."

Stark *v.* Starrs, 6 Wall., 402.

And as the act of June 18, 1874, just quoted, directed that patents should be issued in all cases where the certificate of the governor showed the completion of the wagon road, we claim that the lands in controversy, so far as the Government is concerned, are virtually patented lands, and that the appellee has an indefeasible title.

The act of Congress of March 2, 1896 (29 Stat., 42), providing for the time when suits may be brought to vacate patents, contains this provision in section 1: "But no patent to any lands held by a *bona-fide* purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed."

Admitting, however, that in the technical sense the lands were not patented lands, yet they were lands certified by the Commissioner of the General Land Office on December 18, 1869, to the State of Oregon, for the benefit of the Dalles Military Road Company.

In United States *v.* Winona & St. Peter Railroad Company (165 U. S., 481), the Supreme Court says:

"Our conclusion is that these acts (March 3, 1887, and March 2, 1896) operate to confirm the title to any purchaser from a railroad company of lands *certified* or patented to or for its benefit, notwithstanding any mere errors or irregularities in the proceedings of the Land Department, and notwithstanding the facts that the lands so certified or patented were, by the true construction of the land grants, excepted from their operation, providing that he purchased in good faith, paid value for the

lands; and providing, also, that the lands were public lands in the statutory sense of the term, and free from individual or other claims."

If a suit should be brought by the United States against the Eastern Oregon Land Company to recover the lands claimed by it, we think it would not be possible to maintain such suit, and that the court would confirm the title to the company.

In section 2 of the act of March 2, 1896, there is this provision:

"And if such claimant, or one claiming to be a *bona-fide* purchaser (of lands erroneously patented or *certified*), but who has not submitted his claim to the Secretary of the Interior, is made a party to such suit, and if found by the court to be a *bona-fide* purchaser, the court shall decree a confirmation of the title," etc.

But this court has already declared the Eastern Oregon Land Company to be a *bona-fide* purchaser—it is *res adjudicata*. (148 U. S., *supra*.)

So, in any suit between the United States *v.* the Eastern Oregon Land Company, its title is secure and will stand confirmed.

How, then, can the Commissioner of the General Land Office take away the title of the appellee and give it to the appellant?

When the appellant made application to purchase the land in controversy, he well knew that it was claimed by the appellee as successor and assignee of the Dalles Military Road Company, and was a *bona-fide* purchaser thereof.

Fourth.

If any lands were excepted from the grant to the State on account of the Northern Pacific Railroad Company's grant, was such exception of lands in the State of Oregon ten or twenty sections to the mile?

The grant is of "every alternate section of public land not reserved, designated by odd sections, to the amount of twenty alternate sections per mile on each side of said railroad line as said company may adopt through the territories of the United States, and ten sections of land on each side of said railroad whenever it passes through any State."

We think the intention of Congress to grant to the Northern Pacific Railroad Company ten sections of land only on each side of the road within a State is apparent from the terms of the grant, and that the extent of the grant to that company depends upon the location of the land. By the express terms of the statute, if the road passes through a State the grant is limited to ten sections to the mile on each side of the road. The words, "through the Territories of the United States," we think may be read as referring to the grant; but if they refer to the line of the road which the company might adopt, still it may be held, without doing violence to the language employed, that where the line is located in a Territory, the grant within a State is limited to ten sections to the mile.

Congress must have had some reason for making the grant in a Territory double that in a State. Lands within a State might fairly, on account of a larger and denser population and older communities and better development of the country, be presumed to be of greater value than lands in a new Territory. It was the location of the lands and not the location of the road, therefore, that must have controlled Congress.

It can hardly be possible that it was the intention of Congress to grant to the company twenty sections of land to the mile within a State if the company should choose to locate its road, as in the present case, within a Territory, but immediately along the boundary line between a State and a Territory.

A long-established rule of construction of such grants is that they will be construed strictly and not extended by implication beyond their natural import.

United States *v.* Arrendo, 6 Pet., 699;
Jackson *v.* Lampshire, 3 Pet, 280–9;
Beatty *v.* Knowler, 4 Pet., 52;
Charles River Bridge Co. *v.* Warrer Bridge, 11 Pet., 422;
Griffing *v.* Giib, 1 McAl., 211.

Grants of land by acts of Congress to aid in the construction of a railroad should be strictly construed against the grantees. Nothing passes but what is conveyed in clear and explicit language.

Dubuque, etc., R. R. Co. *v.* Litchfield, 23 How., 66–88.

If the construction of the grant to the Northern Pacific Railroad Company we contend for can be given to the statute, it should be adopted by the court.

JAMES K. KELLY and
NIXON & DOLPH,
Solicitors for Appellees.